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In The  
**Supreme Court of the United States**  
October Term, 1993

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FLORENCE DOLAN,

*Petitioner,*  
v.

CITY OF TIGARD,

*Respondent.*

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On Writ Of Certiorari  
To The Oregon Supreme Court

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**BRIEF FOR TERENCE AND TAMARA WELLNER AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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**QUESTIONS PRESENTED**

1. Whether a governing municipality, as a condition of approvals to develop privately owned real property, can require the dedication of a portion of such property for a public purpose, without just compensation, absent a finding of a substantial relationship evidenced by an essential nexus between the dedication (exaction) and the impacts resulting from development?
2. Whether the Oregon Supreme Court erred in failing to apply heightened scrutiny as required by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), to Petitioner's claim that the city's permit exactions were a taking in violation of the fifth and fourteenth amendments to the United States Constitution?

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## INTEREST OF THE AMICUS CURIAE

Terence and Tamara Wellner are the owners of undeveloped real estate located in Clark County, Washington. The Wellners intend to develop and/or sell their real estate for development purposes.

In 1990, the State of Washington adopted a Growth Management Act, Revised Code of Washington, Chapter 36.70A, requiring counties and cities which are subject to specified growth and population parameters to adopt regulations affecting land use and development.

In compliance with the provisions of the Washington Growth Management Act, Clark County is preparing ordinances which will impose restraints and/or require dedications of land as a condition of development of the Wellner's property. The effect of such ordinances is to require the Wellners to bear the cost and other burdens of public benefits under the Washington Growth Management Act. Hence, the Wellners are keenly interested in the present litigation.

For these reasons, the Wellners submit this brief *amicus curiae* to assist the Court in its resolution of this case. Letters of consent to appear *amicus curiae* have been received from the attorneys for the petitioner and the respondents.

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## SUMMARY OF ARGUMENT

This case presents a question of the correct standard, under the takings clause of the fifth amendment to the United States Constitution, as applied to the states under

the fourteenth amendment, for determination of the constitutionality of exactions required by governing municipalities as conditions of development approval.

Petitioner, Florence Dolan, applied to the City of Tigard for permits to demolish a 9,700 square foot building and construct a 17,600 square foot building in which to relocate her hardware store. As a condition of approval, the city required Petitioner to dedicate approximately 7,000 square feet, one-tenth of her property, for storm drainage and a pedestrian/bicycle pathway. The city based this condition upon a finding that the dedications were "reasonably related" to the impact from Petitioner's development, but failed to include findings regarding the precise impact.

Petitioner pursued administrative and judicial appeals to the Supreme Court of Oregon, where Petitioner argued "that the city must meet a higher standard than 'reasonable relationship', that there must be an 'essential nexus' or 'substantial relationship,' between the impacts of the development and the dedication requirements; otherwise, imposing exactions as a condition of land use approval is an unconstitutional taking." *Dolan v. City of Tigard*, 854 P.2d 437, 441 (1993). The Oregon Supreme Court held that the "city's unchallenged factual findings support the dedication conditions imposed by the city." *Id.*, at 443.

Amicus curiae, in support of Petitioner, before this Court on writ of certiorari, argue that the "reasonable relationship" test advocated by the City of Tigard is vague and overbroad because it fails to establish the

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logical extent and standards for determination of the relationship between exactions and impacts of development. Hence, the "reasonable relationship" standard gives no guidance to city planning staff or private land-owners as to the constitutional limits upon regulatory discretion.

The "reasonable relationship" test conflicts with the requirement of this Court in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that the exaction "substantially advance legitimate state interests." Further, the "reasonable relationship" test fails to provide the "essential nexus" required by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). Under this Court's holding in *Armstrong v. United States*, the failure to find a nexus between the exaction and the impacts from Petitioner's development has unconstitutionally shifted the cost and burden of public benefits to Petitioner, resulting in a taking of private property for public purpose, without just compensation. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

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## ARGUMENT

### I. THE "REASONABLE RELATIONSHIP" TEST ADVOCATED BY CITY OF TIGARD IS VAGUE AND OVERBROAD, PROVIDING NO GUIDANCE TO CITY PLANNING STAFF AND PROPERTY OWNERS AS TO THE CONSTITUTIONAL LIMITS UPON REGULATORY DISCRETION.

In denying Petitioner's request for a variance, the City of Tigard determined that the "dedication and pathway construction are *reasonably related* to the applicant's request to intensify development". City of Tigard Planning Commission Final Order No. 91-09 PC, Pet. App. G-24 (emphasis added). This level of scrutiny was interpreted by city officials to include speculations regarding what is "reasonable to assume" or "reasonable to expect". As stated in the city's Final Order:

It is *reasonable to assume* that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs.

The increased impervious surface *would be expected* to increase the amount of storm water runoff from the site to Fanno Creek.

City of Tigard Planning Commission Final Order No. 91-09 PC at 13, 20-21, Pet. App. G-24, G-37 (emphasis added).

The introduction of modifiers which dilute the constitutional standard is a natural result of an ambiguity inherent in the term "reasonable" when used without further definition. If reasonable is intended in the sense

of "rational" or "logical", then the test is overbroad and offers no guidance as to the constitutional limit of regulatory discretion. A logical relationship can be found in any connection which is not self contradictory.

For example, the general increase in vehicular traffic cited in the city's Final Order No. 91-09 PC at 13, Pet. App. G-24, could be alleviated by the construction of a new arterial road, not connected to Petitioner's development, but located within the same traffic grid system. If the constitutional test were satisfied by mere logical relations, the city could impose the cost of this new road upon Petitioner's proposed 17,600 square foot hardware store. Taken further, a general increase in traffic could be used to justify the construction of an airfield so that cross country travellers could fly to their destination rather than drive through the city. These examples, like the city's analysis, stretch the imagination, but fall within the bounds of "logical relation".

Certainly the cost of such excessive mitigations would dwarf the cost of Petitioner's entire development. Yet this is the same line of reasoning adopted in the city's Final Order:

(T)he proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/ bicycle pathway as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

City of Tigard Planning Commission Final Order No. 91-09 PC at 13, Pet. App. G-24.

If, on the other hand, the term "reasonable" intends the traditional "reasonable man" standard, we are confronted with a test which is unworthy of the task presented. Certainly, we cannot presume that the reasonable man is schooled in the subtleties geo-hydrology and traffic engineering. In fact, the "reasonable city planner" is just as likely to be ignorant of these disciplines. The "reasonable traffic engineer" and "reasonable geo-hydrologist", on the other hand, are well qualified to bring precise calculation to the determination of whether exactions are sufficiently related to impacts.

The vagueness and overbreadth of the "reasonable relation" standard can be cured by an additional requirement that relation must be demonstrated using precise engineering data. Such a standard provides the "essential nexus" articulated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). Engineering calculations will doubtless include assumptions, but the articulation of assumptions within a formula will allow applicants to review and challenge the conclusions based upon evidence. Cities that wish to rely upon the expertise of their own staff could easily prove their qualifications by including findings consisting of precise engineering calculations. Precise findings are entirely lacking in this case.

Without precise calculation, it is impossible to determine whether the exaction is even remotely related to the impact, let alone whether it accurately responds to the degree of impact. Yet to require the dedication of even a

few feet more than necessary for mitigation would constitute no less a taking than the dedication of an entire acre. Certainly a doctrine so central to the Constitution as the protection of private property demands the intervention of those most qualified to calculate the impacts of development and propose a proper mitigation.

**II. THE INTRODUCTION OF "REASONABLE RELATIONSHIP" INTO THE TEST FOR REGULATORY TAKINGS CREATES AN AMBIGUITY RESULTING FROM A CONFLICT BETWEEN THAT TERM AND THE REQUIREMENT THAT THE EXACTION "SUBSTANTIALLY ADVANCE" A LEGITIMATE STATE INTEREST.**

The test for constitutionality of regulatory takings was articulated by this Court in *Agins*:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests (citation omitted), or denies an owner economically viable use of his land (citations omitted).

*Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

Expanding upon this doctrine in *Nollan*, this Court observed that the rule lacks precise formulation:

Our cases have not elaborated on the standards for determining what constitutes a legitimate state interest or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.

*Nollan, supra* at 834.

The formulation advocated by the city would require that the exaction: (i) substantially advance a legitimate state interest, and (ii) "reasonably" relate to the impact from the proposed development. In analyzing this formulation, we are immediately confronted with a curious ambiguity resulting from a conflict between the two requirements.

This conflict is evident in the observation that the "impact from the proposed development" in clause "ii" is merely the converse of the "legitimate state interest" in clause "i". The use of the term "impact" carries with it the implication that some state interest has been impacted. Any state interest can be restated as an impact, and vice versa, merely by adding a negation. The impact of failed traffic systems is merely the converse of the state interest in efficient traffic management. The impact of excess storm water run-off is merely the converse of the state interest in efficient storm water drainage.

It would be difficult to imagine a case in which the exaction is only reasonably related to the failure to satisfy a state interest, yet substantially related to that same state interest. If traffic mitigation (the exaction) is only reasonably related to failed traffic systems (the impact), then it is only reasonably related to the state interest in orderly and efficient traffic flow (i.e. the avoidance of failed systems). If required storm drainage systems (the exaction) are only reasonably related to excess run-off (the impact), then they are only reasonably related to the state interest in efficient storm water management (i.e., the avoidance of excessive run-off).

The Oregon Supreme Court opinion is confusing because it fails to appreciate this relationship between the impact and state interest. In reviewing the history, the court observes:

Before the Supreme Court's decision in *Nollan*, federal and state courts struggled to identify the precise connection that must exist between the conditions incorporated into a regulation and the governmental interest that the regulation purports to further if the regulation is to be deemed to "substantially advance" that interest.

*Dolan v. City of Tigard*, 854 P.2d 437, 442 (1993).

If the regulation is to "substantially advance" an interest, then it would seem that the required connection has been identified, or perhaps the Oregon court intends different meanings for "furthering" and "advancing" state interests.

The decision in *Nollan* implicitly recognizes the inherent relationship between state interest and the impact of development, as evident in the requirement of an "essential nexus" if the exaction is to "substantially advance legitimate state interests." As stated by this Court:

(T)he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the

takings and land-use context, this is not one of them.

*Nollan, supra* at 837.

**III. FAILURE TO FIND A "NEXUS" BETWEEN THE IMPACT AND EXACTION UNCONSTITUTIONALLY SHIFTS THE COST AND BURDEN OF PUBLIC BENEFITS TO PETITIONER, A PRIVATE LANDOWNER.**

The City of Tigard has required dedication of approximately 10% of the Dolan property based, not upon a nexus between the impact of the development and the required exaction but, rather, upon a stated policy to facilitate the completion of general public improvements. As noted in the city's Final Order:

(Under Community Development) Code Section 18.86.040 . . . The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the following objectives:

- b. The development shall facilitate pedestrian/bicycle circulation if the site is located . . . adjacent to a dedicated greenway/open space/park. Specific items to be addressed are as follows:
  - i. Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive plan.

Community Development Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the city shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan.

City of Tigard Planning Commission Final Order No. 91-09 PC, Pet. App. G-17, G-18, G-21, G-22.

It is clear from Community Development Code sections cited in the Final Order that the purpose of the required dedication was to facilitate the completion of the city's plan for a comprehensive program of bicycle circulation. This is a laudable public goal, but there are no findings showing a nexus between this goal and Petitioner's proposed plan of private development. In fact, the Code would require the same exaction even if Petitioner's development resulted in a reduction in the total traffic generated from the site. Application of the Code in this case has resulted in an unconstitutional shift of the cost and burdens of public benefits to Dolan, a private landowner. As noted by this Court in *Nollan*:

One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the

public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

*Nollan, supra* at 835.

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### CONCLUSION

The "reasonable relationship" test advocated by the City of Tigard is violates the takings clause of the fifth and fourteenth amendments because it fails to satisfy the requirement of a "substantial relationship" as evidenced by an "essential nexus" between exactions and impacts, based upon precise findings as to the type and degree of impact.

The Oregon Supreme Court erred in applying the "reasonable relationship" test, and not requiring findings of an "essential nexus" between the dedication and the precise impacts of Petitioner's development. Thus, the holding in *Dolan v. City of Tigard*, 854 P.2d 437 (1993), should be reversed.

Respectfully submitted,

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